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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ——— 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.,
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.,
and
SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 25, 1977

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INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Institute For Shippers' Associations (AISA) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 24, 1977.

OPINIONS BELOW

The judgment of the Court of Appeals appears in Appendix A hereto. The memorandum opinion of the Court of Appeals appears in Apendix B hereto. The opinion of the Interstate Commerce Commission is reported at 350 ICC 391-423.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1977 (Appendix A), and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may curtail the ability of nonprofit cooperative shippers' associations to market the products of their members by declaring that a shippers' association, long recognized to be itself a shipper, is ineligible for membership in a similar "association of shippers," contrary to the intent of Congress that shippers' associations shall enjoy a preferred status in the nation's transportation industry.

2. Whether the Interstate Commerce Commission is bound to comply with the pre-investigation requirements of the Administrative Procedure Act, specifically 5 U.S.C. § 558(c), in a proceeding looking toward the withdrawal of a statutory exemption or permission accorded transportation entities excluded from economic regulation.

STATUTES INVOLVED

Sections 402(a)(5) and 402(c)(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5) and 1002(c)(1), and Title 5, United States Code, §§ 551(8) and 558(c) are set forth in Appendix C hereto. Particularly relevant to this petition is the language of Section 402

(c)(1) of the Interstate Commerce Act which provides that the provisions of the Interstate Commerce Act that regulate freight forwarders shall not be construed to apply to an "association of shippers, in consolidating or distributing freight . . . for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . ."

STATEMENT

Petitioner American Institute for Shippers' Associations, Inc., (AISA) is a national trade association whose members include nonprofit cooperative shippers' associations, excluded from federal economic regulation by Section 402(c)(1) of the Interstate Commerce Act. AISA was an intervenor in the proceedings before the Interstate Commerce Commission in support of Sunshine State Shippers and Receivers Association, Inc., and was one of the joint petitioners before the United States Court of Appeals for the District of Columbia Circuit. The members of AISA are vitally concerned with the issues presented in this petition.

Petitioner Sunshine State Shippers and Receivers Association, Inc., (Sunshine), was organized in 1971 with the stated purpose of operating as an unregulated shippers' association under the terms of Section 402(c)(1) of the Interstate Commerce Act. The membership of Sunshine consisted of both businesses and manufacturers, and also other shippers' associations operating pursuart to Section 402(c)(1) of the Interstate Commerce Act. One of the shippers' association members of Sunshine was New Jersey Shippers Pooling Association, Inc. (New Jersey Shippers), a New Jersey shippers' association that joined Sunshine so that it would have a voice in the operations of Sunshine.

The Interstate Commerce Commission (ICC) commenced an investigation of Sunshine in order to deter-

mine whether Sunshine was operating as a regulated freight forwarder, as defined in Section 402(a)(5) of the Interstate Commerce Act, or whether Sunshine was operating as a bonafide shippers' association. After seven days of hearings and after reviewing the evidence, Administrative Law Judge Gibbons found only one serious defect in the operations conducted by Sunshine: *the fact that Sunshine allowed other shippers' associations to become members.* Judge Gibbons, however, did not issue a cease-and-desist order. Rather, because such membership was not specifically prohibited by any Commission decision or regulation, and because Sunshine had fully cooperated with the Commission's investigation, Judge Gibbons gave Sunshine a reasonable opportunity to bring itself into compliance.[1]

All parties filed exceptions to Judge Gibbons decision and on August 1, 1975, Division 1 of the ICC issued a 33 page report (350 ICC 391-423). The written report rejected Judge Gibbons' finding that Sunshine should be given an opportunity to achieve compliance. Instead, the Commission found Sunshine to be operating as a freight forwarder and issued a cease-and-desist order.

The ICC action thus barred a nonprofit cooperative shippers' association from joining another similar shippers' association. New Jersey Shippers, which had joined Sunshine in order to insure that Sunshine handled the freight of New Jersey Shippers promptly, properly, and efficiently, was forced to give up its membership in Sunshine.

Petitioners appealed the ICC decision to the U.S. Court of Appeals for the District of Columbia Circuit. The ICC took the position before the Court of Appeals that

[1] Judge Gibbons, however, did not specifically rule that Section 558(c) of Title 5, United States Code, deprived the Commission of jurisdiction over the proceeding.

it did not intend to strictly interpret its holding of law that barred one shippers' association from joining another shippers' association. Rather, in order to justify its position, the ICC made several concessions. The ICC conceded that Sunshine could bring itself into compliance with the outstanding cease-and-desist order by merely enrolling the individual members of Sunshine's member shippers' associations as members of Sunshine. The ICC further conceded that these new members could appoint a representative as their agent to oversee their interests in Sunshine (Appendix B, page 1). Based upon these representations the Court of Appeals affirmed, noting that had it addressed the membership issue in the first instance "we might not choose the interpretation of Section 402 proposed by the Commission." (Appendix B, page 2).

The Court of Appeals opinion, attached hereto as Appendix B, fails to recognize the anomalies created by its decision and the extreme burdens placed on shippers' association by its dual membership theory. Even more disturbing, however, is the failure of the Court of Appeals to recognize the clear meaning of Section 402(c) of the Interstate Commerce Act which excludes from regulation an "association of shippers." Since a shippers' association has consistently been recognized to be a shipper and not a carrier, such associations clearly qualify for membership in an "association of shippers."

REASONS FOR GRANTING THE WRIT

I. THIS APPEAL INVOLVES SIGNIFICANT STATUTORY AND POLICY CONSIDERATIONS IN THE ADMINISTRATION OF THE INTERSTATE COMMERCE ACT IN THAT THE DECISIONS BELOW SEVERELY CURTAIL THE ABILITY OF NONPROFIT COOPERATIVE SHIPPERS' ASSOCIATIONS TO MARKET THE PRODUCTS OF THEIR MEMBERS BY ABROGATING THE RIGHT OF A SHIPPERS' ASSOCIATION, EXCLUDED FROM REGULATION BY SECTION 402(C)(1) OF THE INTERSTATE COMMERCE ACT, FROM ENJOYING THE INHERENT ADVANTAGES OF MEMBERSHIP IN OTHER SHIPPERS' ASSOCIATIONS

A. The Decisions Below Violate The Intent Of Congress That Shippers' Associations Shall Enjoy A Preferred Status Within The Scheme Of National Transportation

Nonprofit cooperative shippers' associations have been in existence in the United States since at least the turn of the twentieth century. The cooperative shipping movement has grown so that today shippers' associations are located in virtually every major city in the United States and in many smaller cities throughout the country. In *Investigation Into Status of Freight Forwarders*, 339 ICC 711 (1971), the Interstate Commerce Commission contrasted the static growth of regulated freight forwarders with the rapid growth of shippers' associations as follows:

> If any one thing is clear from the evidence assembled in the course of the present investigation it is that (regulated) forwarding is at best a static industry . . . .
>
> At the same time, the growth of the unregulated, nonprofit shippers' associations has been rapid and regular. (339 ICC 792).

This growth, however, has not been encouraged by the Interstate Commerce Commission. The seventy year judicial history of shippers' associations reveals that the ICC has repeatedly sought to restrain their legitimate activities. Each time, however, a conscientious judiciary has recognized each attempt as being inconsistent with the mandate of Congress that shippers' associations remain a viable and important segment of this country's transportation industry. For example, *Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949), *aff'd* 338 U.S. 689 (1950), struck down an ICC decision that would have limited the operations of shippers' associations to those instances where the member is the actual *shipper* of the freight, thus barring a shippers' association from handling any freight where the member is the *receiver* of the freight.

The ICC decision below reflects the same obstructionist view towards the growth of shippers' associations as that expressed in *Pacific Coast Wholesalers' Association*. The ICC holds very simply that a shippers' association is ineligible for membership in another shippers' association. The crux of the ICC reasoning is that since shippers' associations have no direct beneficial interest in the property they handle for their members, they cannot be considered to be shippers, and therefore are incapable of qualifying for membership in an "association of shippers." (350 ICC 404). This reasoning, however, is illogical and conflicts with the Congressional mandate in Section 402 (c) (1) that shippers be permitted to combine and coordinate their shipments by any means whatsoever. Section 402(c) (1) provides that the ICC shall not construe Part IV of the Act so as to apply its regulatory terms to a "group or association of shippers." The true issue, therefore, is whether a shippers' association can be classified as a shipper. If in fact the shippers' association members of Sunshine are shippers, the inquiry must stop since

Sunshine would in law be an "association of shippers" within the literal meaning of Section 402(c)(1) of the Interstate Commerce Act.

Long before the enactment of Part IV of the Interstate Commerce Act, shippers' associations were recognized to be "shippers" rather than carriers. *California Commercial Association* v. *Wells, Fargo & Company*, 14 I.C.C. 422 (1908). The modern day shippers' association has also been held to be a "shipper." *Atlanta Bonded Warehouse, Inc., Common Carrier Application*, 91 M.C.C. 104 (1962). Since shippers' associations are "shippers", it must follow that an "association of shippers" must include an "association of shippers' associations." By holding otherwise the ICC and the Court of Appeals below contravened the clear and unambiguous meaning of the statute.

Since statutory construction is a judicial function, the Federal Courts are not bound by the construction the ICC gives to the Interstate Commerce Act but rather must construe the statute themselves. *Miller* v. *Burger*, 161 F.2d 992, 994 (9th Cir. 1947). Nor should the Federal Courts slip into judicial inertia by standing aside and rubber-stamping administrative interpretations. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973); *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. den.* 411 U.S. 917 (1973). The Court of Appeals failed to recognize these principles of statutory construction when it stated in its opinion that had it addressed the issue in the first instance "we might not choose the interpretation of Section 402 proposed by the Commission." (Appendix B, page 2).

It was the responsibility of the ICC and the Court of Appeals to apply the Interstate Commerce Act on the basis of what Congress had written, not what Congress might have written. *United States* v. *Great Northern*

Ry., 343 U.S. 562 (1952). Since the statutory language in question defines a shippers' association as an "association of shippers," and since a shippers' association is recognized to be a shipper, the language of Section 402(c)(1) must be taken literally and a shippers' association must be declared eligible for membership in "an association of shippers." *Commissioner of Immigration* v. *Gottlieb*, 265 U.S. 310 (1924). The ICC decision below represents nothing less than an unlawful attempt to rewrite the Interstate Commerce Act, and to give effect to Commission ideas of policy. *Busse* v. *Commissioner*, 479 F.2d 1147 (7th Cir. 1973).

The intent of Congress is clearly expressed in the broad language of Section 402(c)(1) of the Interstate Commerce Act. The ICC declared in 1964 that Section 402(c)(1) "clearly safeguards the right of all shippers to combine their goods, on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from their collective ability to utilize volume rates." *Atlanta Shippers Association, Inc.—Investigation*, 322 I.C.C. 273, 277 (1964). In its decision below the Commission refused to recognize that its holding of law violated both the letter and the spirit of Section 402(c)(1). Section 402(c)(1) is a direct recognition by Congress that small shippers, faced with increasing transportation costs for less-than-truckload and less-than-carload shipments, must turn to nonprofit cooperative shippers associations in order to take advantage of volume rates. The impact of the holding below will have its greatest impact on these small shippers. It is not an exaggeration to state that the inability of shippers' associations to hold memberships in other shippers' associations will place the smaller industries of this nation at an economic disadvantage with their larger competitors who can ship their products at volume rates. In *Interstate Commerce Commission* v. *Delaware, Lackawanna, and Western Railroad Co.*, 220

U.S. 235 (1911). this Court was faced with a railroad tariff provision which would have precluded shippers' associations from taking advantage of volume carload rates. In striking down the provision, this Court favorably cited the following language from an earlier ICC decision in *California Commercial Association* v. *Wells Fargo & Co.*, 14 I.C.C. 422 (1908), which struck down a similar tariff provision:

> It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries, and more surely establish the dominance of the greater industrial and commercial institutions. (14 I.C.C. 434, cited at 220 U.S. 244).

The decisions below will have an impact identical to that of the tariff provision chastised by this Court in the *Delaware, Lackawanna* decision. Thus the issues in this case are of paramount importance to the continued vitality and growth of the nonprofit cooperative shipping movement in this country and warrant review by this Court.

In *Baltimore Shippers and Receivers Association* v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Calif. 1967), *aff'd per curiam*, 389 U.S. 583 (1968), the State of California attempted to subject to state regulation interstate motor carriers serving nonprofit cooperative shippers' associations within commercial zones. In resolving the issue in favor of the associations, the district court noted that Section 402(c)(1) of the Interstate Commerce Act "indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation." This Congressionally mandated preference accorded to shippers' associations is destroyed by the rulings below which prevent shippers' associations from enjoying the inherent advantages of

membership in other shippers' associations. The task of overturning the rulings below and preserving Congress' mandate is now left to this Court.

The Court of Appeals below justified its rubberstamp of the ICC decision by protecting the right of the individual members of Sunshine's member shippers' associations to become members of Sunshine and appoint a representative as their agent to oversee their interests in Sunshine. Such measures, however, do not eliminate the unambiguous provisions of Section 402(c)(1) which clearly open membership in a shippers' association to other shippers' associations. Nor do such measures eliminate the fact that the Congressional mandate expressed in Section 402(c)(1) has been violated. In addition, such measures impose economic and administrative barriers such as membership fees, additional paperwork, duplicity of operation, and the necessity for proxy solicitations, all of which have no place in a nonprofit cooperative shippers' association which returns each dollar of savings to its members.

By providing for dual membership the Court of Appeals decision recognizes the need for one shippers' association to join another shippers' association. Yet the Court of Appeals refuses to satisfy that need. The Court of Appeals in effect does everything but answer the membership issue in the affirmative. Its failure to take that last necessary step and to enforce the expressed intent of Congress mandates review and reversal by this Court.

B. The Decisions Below Contravene The Principles Enunciated In *Columbia Shippers And Receivers, Inc.* v. *United States*, And Create Serious Anomalies In the Proper Interpretation And Administration Of the Interstate Commerce Act In That the Decisions Below Permit A NonProfit Cooperative Shippers' Association To Utilize The Services Of Another Shippers' Association But At The Same Time Prohibit A Shippers' Association From Becoming A Member Of Another Shippers' Association

Prior to the formation of Sunshine, New Jersey Shippers Pooling Association, Inc., had encountered operational difficulties in moving the freight of its members into the Florida market. The pre-Sunshine procedure followed by New Jersey Shippers was to ship freight into Florida, consolidate the freight in Florida with the freight of another shippers' association, and finally distribute the consolidated shipment to the ultimate consignees.

The consolidating of freight from one shippers' association with the freight of another shippers' association is an industry practice commonly referred to as "co-loading." The practice of co-loading has been considered lawful for many years. Almost thirty years ago the Commission sanctioned co-loading in *Pacific Coast Wholesalers Association, Investigation of Status*, 264 I.C.C. 134 (1945), *aff'd Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949), *aff'd* 338 U.S. 689 (1950). One finding made by the Commission in *Pacific Coast* was that "no freight is handled for nonmembers, but one similar association is permitted to ship its freight in cars consigned to the respondent association." (264 I.C.C. 138). Thus, finding that associations shipped their freight together in the same rail car, the Commission also found that the "respondent corporation is an association of shippers engaged in consolidating and distributing freight for its members, on

a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . and that no violation of Part IV of the act has been shown." (264 I.C.C. 142).

More recently in *Columbia Shippers and Receivers Association, Inc.* v. *United States*, 301 F. Supp. 310 (D. Del. 1969), the Court considered the issue of whether one association's "practice of co-loading with other nonprofit shippers' associations" contravenes the Interstate Commerce Act. The Court affirmed the ICC's ruling that shippers' associations may indeed combine their freight in order to take advantage of volume rates. The Court cited with approval the language employed by the ICC in defending its position that one shippers' association could co-load with another shippers' association:

> . . . when (Columbia Shippers and Receivers) co-loads with another shippers' association, both are engaged in furtherance of their nonprofit activities pursuant to the statutory objective of Section 402 (c). 105 M.C.C. at 856. (301 F. Supp. 320).

This same rationale is applicable to the membership issue. When one shippers' association joins another shippers' association both are engaged in furtherance of their nonprofit activities pursuant to the statutory objective of Section 402(c).

It is clear that for thirty years the ICC has permitted shippers' associations to enjoy the most obvious physical benefit of membership in other associations: co-loading. Yet the decisions below bar shippers' associations from enjoying the other inherent advantages of membership. The most obvious advantage of membership is the right to control the shippers' association by voting and sitting on the board of directors. Membership also eliminates the necessity of costly duplicative services and additional paperwork. The effect of the decision below, therefore, is to create the anomalous situation whereby a shippers' association may enjoy the physical benefits of member-

ship in other shippers' associations but at the same time may not enjoy the other benefits of membership. The anomalies thus created by the decisions below warrant review by this Court.

Section 402(c)(1) clearly expresses the intent of Congress that small shippers should be permitted to join together in a nonprofit cooperative effort in order to market their products at inexpensive volume rates. *Columbia Shippers* recognizes this intent of Congress by providing that shippers' associations shall be permitted to avail themselves of the services offered by all regulated and unregulated transportation entities. The decisions below contravene the clear intent of Section 402(c)(1) and the principles enunciated in *Columbia Shippers* by denying membership in a shippers' association to other shippers' associations even though such membership is necessary for the proper marketing of small shipments. The radical differences in approach taken by the ICC and the Court of Appeals below and by the court in *Columbia Shippers*, in interpreting Section 402(c)(1) of the Interstate Commerce Act, warrant review by this Court in order to insure a uniform approach in the administration of the Interstate Commerce Act and in order to insure that nonprofit cooperative shippers' associations maintain their proper role in this nation's transportation industry.

II. THE FAILURE OF THE COURT OF APPEALS TO ADDRESS THE ISSUE OF WHETHER THE ICC IS BOUND TO COMPLY WITH THE PROCEDURAL SAFEGUARDS OF 5 U.S.C. § 558(C) IN A PROCEEDING LOOKING TOWARD THE WITHDRAWAL OF A STATUTORY EXEMPTION OR PERMISSION LEAVES UNANSWERED A FUNDAMENTAL AND VITAL ISSUE OF NATIONAL IMPORTANCE IN THE APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT

One of the overriding and fundamental principles of transportation regulation is the principle that carriers should be permitted stability of operation; that is, that their investment in operations be protected. Carriers, freight forwarders, and shippers' associations, whether they operate by rail, water, motor or air, expend many dollars each year so that they may better serve the shipping and traveling public. These entities would be reluctant to conduct their operations if they were not assured that their investment would be protected against agency intervention. One of the tools used by Congress to provide these entities with stable operations has been the enactment of the Administrative Procedure Act, and specifically 5 U.S.C. § 558(c), which provides that prior to the revocation of a license the licensee must be given notice of the facts or conduct and opportunity to demonstrate or achieve compliance.

Once a regulated carrier is issued a certificate and commences operations, with the concomitant investment in facilities and personnel, Congress has seen fit to protect the carrier's investment by narrowly limiting the power of the appropriate regulatory agency to suspend or revoke the outstanding certificate. This Court has long recognized this fundamental principle that the outstanding operating certificates of carriers are endowed with a special status in order to promote stable and

secure operations. This Court has stated, with respect to the Interstate Commerce Commission, that in "order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate." *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Also, as to air carriers, this Court has said, "it is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called 'security of route'—i.e., providing assurance to the carrier that its investment in operations would be protected insofar as reasonably possible. And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind . . . ." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 324 (1961).

Likewise, the protection afforded by the Administrative Procedure Act has been extended to unregulated entities. Title 5, United States Code, §551(8) defines a "license" as including "statutory exemption or other form of permission." The operations of a shippers' association are conducted pursuant to Section 402(c)(1) of the Interstate Commerce Act, clearly the type of "statutory exemption or other permission" contemplated by the definition of license contained in the Administrative Proceduce Act. *Blackwell College of Business* v. *Attorney General*, 454 F.2d 928 (D.C. Cir. 1971); *Nuclear Data Inc.* v. *Atomic Energy Commission*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

This case demonstrates an awesome power in the hands of the ICC—the power to issue cease-and-desist orders against unregulated entities without first providing an opportunity to demonstrate or achieve compliance. The practical effect of such litigation and cease-and-desist orders is destruction of a previously viable organization.

While litigation may be a cost of doing business, the prospect of avoiding litigation by providing an opportunity to demonstrate or achieve compliance should be a goal of the ICC and this Court.

The position of petitioners is all the more meritorious in light of the fact that the ICC has acknowledged the noveity of its substantive ruling and the Court of Appeals has acknowledged that had it faced the issue in the first instance it might have reached a different result. The issuance of a cease-and-desist order under such circumstances clearly requires an opportunity to achieve compliance. Failure to grant such an opportunity constitutes a retroactive application of a newly adopted rule and violates the basic concepts of fair play. *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 148 (9th Cir. 1952).

We believe that determination of this issue is of significant importance to the nation and to the entire unregulated transportation industry which must know whether its present investments are subject to yet another regulatory threat. The ICC has here successfully nullified the impact of the procedural safeguards contained in the Administrative Procedure Act. This Court should review this issue in order to insure that the safeguards contained in the Administrative Procedure Act are properly interpreted and enforced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

Judgment of the United States Court of Appeals, for the District of Columbia Circuit in *American Institute For Shippers' Associations, Inc., et al.*, v. *United States of America et. al.*, No. 76-1005, entered February 24, 1977.

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

No. 76-1005

[Filed Feb. 24, 1977, George A. Fisher Clerk]

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

FREIGHT FORWARDERS INSTITUTE,

Intervenor

Petition for Review of an Order of the Interstate Commerce Commission

Before: WRIGHT, LEVENTHAL, and WILKEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Interstate Commerce Commission and was argued by counsel.

For the reasons stated in the attached memorandum, it is

ORDERED and ADJUDGED by this court that the order of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit in *American Institute for Shippers' Association, Inc., et. al. v. United States, et. al.* No. 76-1005, entered February 24, 1977.

MEMORANDUM

We think this is an appropriate case to defer to the Commission's understanding of the act which it administers. The position it has taken here—that *bona fide* shippers' association may not have other shippers' associations as members—is consistent with Section 402(c) of the Interstate Commerce Act, 49 U.S.C. § 1002(c) (1970), which states that the freight forwarder provisions of the Act shall not apply to "the operations of a shipper, or a group or association of shippers." Nothing in this language suggests that Congress contemplated associations of associations of shippers. This is not itself dispositive, however, because Section 402(c) only clarifies the definition of freight forwarder set out in Section 402 (a) of the Act, 49 U.S.C. § 1002(a) (1970). Nonetheless, we think the Commission's interpretation is reasonable given the following factors: (1) the Commission's representation that administration of the freight forwarder provisions of the Act wil be hampered if shippers' associations are allowed to have other associations as members; (2) its further representation that petitioner Sunshine State can bring itself into compliance with the outstanding cease-and-desist order simply by enrolling the members of its member associations as members of Sunshine itself; (3) its assurance at oral argument that nothing would prevent members of, *e.g.*, petitioner New Jersey Shippers Polling Association, from appointing the director of New Jersey Shippers as their agent to oversee

their interests in Sunshine State once those members were also direct members of Sunshine; and (4) a line between freight forwarders and shippers associations must be drawn somewhere, and the function of line-drawing is normally one left to the sound discretion and expertise of the agency.

Thus, although we might not choose the interpretation of Section 402 proposed by the Commission were we to address the matter in the first instance, we cannot say that the Commission has acted unreasonably in interpreting its statutory mandate, given the limited impact of the interpretation chosen on the right of shippers and the consistency of that interpretation with the language of Section 402. *See Bayside Enterprises, Inc.* v. *NLRB*, —— U.S. ——, ——, 45 U.S. L. WEEK 4086, 4087 (Jan. 11, 1977). For this reason, the order of the Commission is

Affirmed.

APPENDIX C

Statutes Involved

49 U.S.C. § 1002(a)(5)

The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carrier subject to chapters 1, 8, or 12 of this title.

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49 U.S.C. § 1002(c)(1)

The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . .

5 U.S.C. § 558(c)

. . . the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institu-

tion of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements

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5 U.S.C. § 551(8)

"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.